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May 4, 1996

Federal Communications Commission
Washington D.C. 20554

Re: Comments on Proposed Rules in IB Docket No. 95-59; FCC-78
Prohibiting Condominium and Townhouse Association regulation of the location of dishes on Association Property providing Direct Broadcast Satellite (DBS) service.

Gentlemen:

I represent condominium and townhouse associations and unit owners in the Chicago metropolitan area. I am submitting these comments in the hope that you will not adopt the above captioned proposed rule in their current form. The proposed rule is intended to invalidate the enforcement of existing condominium and townhouse association declarations that regulate placement of mini-satellite dishes known as Direct Broadcast Satellite (DBS) service on association property. Such declarations are covenants running with the land. That proposed rule could radically change condominium life, especially in high rises, and reduce the value of condominiums and townhouses in the Chicago area. It is my opinion, that if the proposed rule were adopted, the rule would be subject to a legal challenge under the holding of the U.S. Supreme Court in Loretto v. Teleprompter Manhattan CATV

Corp.,458 US 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164. This law firm would be prepared to bring such an action.

To guarantee aesthetic uniformity and to protect against dangerous conditions, virtually every condominium and townhouse declaration prohibits attachments to the sides of their buildings, in hallways and other parts of the common elements except with the approval of the condominium board. The proposed rules would do away with this It would also eliminate any local zoning regulations that could effect the placement of these dishes. The City of Chicago and many Chicago area suburbs currently has such a limitation.

The uniform maintenance of common condominium and townhouse association property is a property right. The condition of the common portions of a condominium effects property values. That is one of the major reasons that limitations on use of the common elements appear in condominium declarations. If the hallways look like a slum, the doorways are different colors and broken buggies and rusted barbecues are parked on the balconies, that will drive down the value of condominium units. Such board limitations are unit owners property rights since a portion of the price of your unit is directly attributable to the board's ability to regulate the use of the common portions of the condominium. Most of the time, it is the condominium board that enforces these limitations. However, state courts in Illinois and across the country have recognized that since they are property rights, the individual unit owner can also enforce them in court. A recent Illinois appellate court decision held that unit owners have standing to sue other unit owner for damage resulting from that owners failure to follow condominium rules and regulations. And in another Illinois appellate court decision where a condominium board permitted the expansion of a balcony into the common elements, a neighboring unit owner

successfully took both the balcony owner and the board to court for violations of the association covenants.

The Federal Government is Not Prepared to Reimburse Condominium Owners for the loss in value to their condominium. Children learn in high school civics courses that government cannot take private property without reimbursement. The concept goes back to the American Revolution where one of the issues the colonists complained of was the British quartering of solders in private homes without reimbursement to the owner. The process of reimbursement is eminent domain. It is provided for in Sections 9.3 and 9.4 of the Illinois Condominium Property Act. 765 Illinois Complied Statutes Section 605/1 et. al (West 1995). These provisions were adopted in part because the Illinois Toll Highway Authority had to take a great deal of condominium property in the suburbs and down state to expand the state toll road system. Despite the fact that the proposed rule would take away condominium owner's property rights and reduce the value of their units, the Federal Communications Commission appears to be saying that the federal government does not believe it has the same obligation as the Illinois Toll Highway Authority to reimburse the condominium property owner. The U.S. Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 held that governmental actions of this nature amount to a taking, which cannot be undertaken without reimbursement. This is because they would require the permanent physical occupation of a portion of condominium or townhouse association property for communications equipment. 73 L. Ed. 2d at 879. Nor did the Court find that it may any difference that the governmental action was limited to certain types of property. 73 L. Ed 2d at 884. The facts underlying this proposed rule very closely parallel those of the Loretto case. In

addition, to the permanent physical occupation of a portion of condominium or townhouse association property without reimbursement, this proposed rule would amount to a taking on a second basis since it would also diminish the property values of the effected condominiums and townhouses, a portion of which are directly attributable to the existence of uniformity requirements with respect to common elements in condominium or townhouse association declarations..

Regulation of the Exteriors of Condominiums is also intended to protect against injuries or damage from falling objects. The notice of the proposed rule in the Federal Register states the Federal Communications Commission does not consider aesthetic considerations to justify condominium limitations on the placement of satellite dishes. The FCC appear to have forgotten that common element regulations especially of the exterior, are also intended to prevent injuries and damage from objects falling off the building, and to protect the condominium association from being sued for such injuries or damage. According to a physics teacher friend, a mini-satellite dish which weighs just 32 pounds and falls out of a fiftieth floor condominium window will hit a person six foot tall or car on the ground with the force of a two and one half ton object! And even if you live in a smaller condominium, a mini-satellite dish which falls out of a tenth floor window will still hit the person on the ground with the force of a half ton object! The recent City of Chicago ordinance requiring regular architectural or engineering inspections of high rise building exteriors was passed because of a serious of incidents last year involving bricks weighing far less than a mini-satellite dish falling off of downtown buildings.

The Federal Communications Commission may have misinterpreted the Congress's Intent in the Telecommunications Act of 1996 is rushing to federalize zoning and eliminate

the property rights of condominium owners. The Federal Register in which the notice of the proposed rule appears, claims the rule is required by the new Telecommunications Act of 1996. The law mandates the adoption of new rules to:

> "prohibit restrictions that impair a viewers's ability to receive video programming services through devices designed for over-the air reception of television broadcast signals, multichannel multi-point distribution service, or direct broadcast satellite services."

If the FCC wants, it could interpret this language to preclude a condominium or townhouse from prohibiting any type of television antenna. But this legislation can be interpreted to recognize that high rise living must be treated differently from rural living, and that the way the Illinois cable laws has been interpreted should be applied to satellite dishes as well. Under the Illinois cable television law, a condominium cannot prevent cable from coming into a building, but the condominium can object to unsightly wiring, installations that may be dangerous, and may require that antennas must be centralized. The property rights of condominium owners need not be sacrificed so that satellite dish manufacturers can make windfall profits. A copy of a recent article I wrote for the Lerner Communications newspaper chain in Illinois is attached to this letter. I would request that the article as well as this set of comments be included in the record with respect to the proposed rules.

Conclusion For the reasons set forth above, I would encourage the Federal Communications not to adopt the proposed rule in its current form.

Sincerely yours,

Ellis B. Levin

cc: Senator Carol Mosley-Baun
Senator Paul Simon
Congressman Sidney R. Yates

Homes

Proposed FCC rule infringes property rights

By ELLIS B. LEVIN
Special to Lerner

A federal agency is quietly proposing rules in Washington, D.C., that could radically change condominium life, especially in high-rises, and reduce the value of condominiums in the Chicago area.

To guarantee aesthetic uniformity and to protect against dangerous conditions, virtually every condominium and town house association declaration prohibits attachments to the sides of the buildings, in hallways and other parts of the common elements except with the approval of the condominium board. The Federal Communications Commission, however, wants to do away with any condominium or town house regulation prohibiting placement on their property of mini-satellite dishes known as Direct Broadcast Satellite (DBS) service. The FCC is also proposing to eliminate any local zoning regulations that could affect the placement of these dishes. The City of Chicago and most suburban communities have such limitations.

The proposed rule is the result of the new telecommunications law passed by the Congress earlier this year to open up cable television competition. There are several potential adverse aspects to this bureaucratic action.

The uniform maintenance of common condominium property is a property right. The condition of the common portions of a condominium affects property values. That is one of the major reasons that limitations on use of the common elements appear in condominium declarations. If the hallways look like a slum, the doorways are different colors and broken buggies and rusted barbecues are parked on the balconies, the value of the condominium units are forced down. Such board limitations are unit owners' property rights since a portion of the price of your unit is directly attributable to the board's ability to regulate the use of the common portions of the condominium. Most of the time, it is the condominium board that enforces these limitations. However, state courts in Illinois and across the country have recognized that since they are property rights, the individual unit owner can also enforce them in court.

In one recent Illinois case, a unit owner was allowed to sue another unit owner for damage resulting from that owner's failure to follow condominium regulations. And in another case in Illinois where a condominium board permitted the expansion of a balcony into the common elements, a neighboring unit owner successfully took both the balcony owner and the board to court.

The federal government is not prepared to reimburse condominium owners for the loss in value to their condominiums.

Children learn in high school civics courses that government cannot take private property without reimbursement. The concept goes back to the American Revolution when one of the actions the colonists complained of was the quartering of British soldiers in private homes without reimbursement to owners. The process of reimbursement is called eminent domain. It is provided for in Sections 9.3 and 9.4 of the Illinois Condominium Property Act. These provisions were adopted in part because the Illinois Toll Highway Authority had to take a great deal of condominium property in the suburbs and down-state at the time to expand the toll-road system. Despite the fact that the proposed federal rule will take away condominium owners' property rights and reduce the value of their units, the federal bureaucracy does not believe it has the same obligation as the Illinois Toll Highway Authority to reimburse the condominium property owner.

Regulation of the exteriors of condominiums is also intended to protect against injuries and damage from falling objects. The notice of the proposed rule, which appeared in the Federal Register,

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Rule

Continued from Page 3

states the federal government does not consider aesthetic considerations adequate to justify condominium limitations on the placement of satellite dishes.

The bureaucrats appear to have forgotten that common element regulations, especially of the exterior, are also intended to prevent injuries and damage from objects falling off the building and to protect the condominium association from liability suits for such incidents.

I called a number of firms that install mini-satellite dishes to try and find out the weight of their equipment. None knew or wanted to give me the information. A physics teacher friend, though, said a dish which weighs just 32 pounds that falls from a 50th floor condominium window would hit a 6-foot tall person or car on the ground with the force of a 2½-ton object! And even if you live in a smaller condominium, a dish which falls from a 10th floor window would still hit the ground with a half-ton of force.

The recent Chicago ordinance requiring regular architectural or engineering inspections of high-rise building exteriors was passed because of a series of incidents last year involving falling bricks weighing far less than a mini-satellite dish.

The bureaucrats may have misinterpreted Congress' intent in the Telecommunications Act of 1996 in rushing to federalize zoning and eliminate the property rights or condominium owners. The notice of the proposed regulation which appears in the Federal Register claims the rule is required by the new telecommunications law. The law mandates the adoption of new rules to "prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multi-point distribution service, or direct broadcast satellite services."

If you want to, you can interpret this language as precluding a condominium from prohibiting any type of television antenna. But this mandate can also be interpreted to recognize that high-rise living must be treated differently from rural living and that the way the Illinois cable laws have been interpreted should be applied to satellite dishes, as well.

Under the Illinois law, a condominium cannot prevent cable from coming into a building, but the condominium can object to unsightly wiring and installations that may be dangerous and may require that antennas must be centralized. The property rights of condominium owners need not be sacrificed so that satellite dish manufacturers can make windfall profits.

It is not too late to express your views to the Federal Communications Commission and your U.S. representatives and senators. While these proposed rules have received very little publicity, your comments may be submitted to the FCC up to May 6, 1996. Comments should be addressed to the Federal Communications Commission, Washington, D.C. 20554. In your comments, refer to IB Docket No. 95-59; FCC-78. In addition, you or your condominium may also want to send copies of your comments to the U.S. representative for your district and the two Illinois senators.

Ellis Levin is an attorney with the law firm of Jerome S. Lamet & Associates, Chicago, who specializes in real estate law and is a former state representative. Send your comments to Lerner Communications, Attn: Real Estate Editor, 7331 N. Lincoln Ave., Lincolnwood, IL 60646.